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10 UNITED STATES BANKRUPTCY COURT

11 DISTRICT OF OREGON

12 In re

13 HemCon Medical Technologies, Inc.,

14 Debtor.

Case No. 16-30119-pcm11

**DEBTOR'S SECOND AMENDED MOTION  
FOR ORDER APPROVING (A) BID AND  
SALE PROCEDURES INCLUDING BREAK  
UP FEE TO TRICOL INTERNATIONAL  
GROUP LIMITED AS STALKING HORSE  
BIDDER; (B) SALE OF DEBTOR'S ASSETS  
FREE AND CLEAR OF LIENS, CLAIMS  
AND ENCUMBRANCES; AND  
(C) ASSUMPTION AND ASSIGNMENT OF  
EXECUTORY CONTRACTS**

*(EXPEDITED HEARING REQUESTED)*

20 HemCon Medical Technologies, Inc., Debtor and Debtor-in-Possession

21 ("Debtor" or "HemCon"), moves this Court for an order (A) establishing bid and sale  
22 procedures including a break-up fee to Tricol International Group Limited ("Tricol") as the  
23 stalking horse bidder; (B) approving the sale of Debtor's assets free and clear of all liens,  
24 claims, interests and encumbrances to the bidder with the highest and best offer received at  
25 an auction (the "Successful Bidder"); (C) determining that the Successful Bidder is not a  
26 successor to Debtor; (D) enjoining any person who has received notice from pursuing the

1 Successful Bidder to recover on any claims they may have against Debtor; and (E) approving  
2 the assumption and assignment of executory contracts to the winning bidder. Debtor requests  
3 an expedited hearing with respect to the bid and sale procedures such that an order can be  
4 entered approving the applicable procedures on February 8, 2016.

## 5 INTRODUCTION

6 1. Debtor filed its voluntary petition for relief under Chapter 11 of the  
7 Title 11 of the United States Code ("Bankruptcy Code") on January 15, 2016 ("Petition  
8 Date").

9 2. Debtor is currently operating its business and managing its property as  
10 Debtor-in-Possession pursuant to Sections 1107 and 1108 of the Bankruptcy Code.

## 11 JURISDICTION

12 3. This Court has subject matter jurisdiction to consider this matter  
13 pursuant to 28 U.S.C. §§ 157 and 1334. Venue is properly before this Court pursuant to 28  
14 U.S.C. §§ 1408 and 1409.

15 4. The statutory predicates for the relief sought herein include Sections  
16 105(a), 363, 365, and, if applicable, 1146 and 1129 of the Bankruptcy Code and Rules 2002,  
17 6004, 6006, 9014 of the Federal Rules of Bankruptcy Procedure ("Bankruptcy Rules") and  
18 applicable local rules and administrative orders.

## 19 BACKGROUND

20 5. Beginning in February 2015, Debtor's executives began taking actions  
21 to address capital requirement needs of Debtor and its affiliates. In May 2015, new equity  
22 capital was sought for investment into Debtor's parent company, TriStar Wellness Solutions,  
23 Inc. ("TWSI") to operate Debtor. A diligence room, documents and business plans were  
24 made available to those with transactional interest. The effort was aimed at three market  
25 groups, broker/dealer investment firms; individual investors/funding source finders; and trade  
26

1 industry buyers. The data room was opened in early June to all prospects in each group after  
2 signing a non-Disclosure Agreement required to access the data room.

3 6. By June 2015 the strategy changed to focusing on a sale of Debtor's  
4 assets. A non-exclusive Advisory Services Agreement was entered into in September 2015  
5 with Healthios Capital Markets, LLC ("Healthios"), a registered broker/dealer focused  
6 exclusively on HealthCare transactions with offices in Boston, London, Geneva and  
7 Bangkok. Healthios targeted 37 industry leaders on the acquisition of Debtor's assets. At the  
8 same time, Debtor's executives contacted 38 individual investors and small funding sources.  
9 In addition, approximately 12 broker/dealer investment firms were contacted to discuss  
10 capital infusions or merger and acquisition interest.

11 7. From June through December 2015, Debtor engaged in 83 meetings  
12 with prospective purchasers and hosted nine site visits regarding a potential sale. The sales  
13 efforts resulted in 1,106 document views and downloads from Debtor's due diligence room.  
14 Substantive negotiations resulted in two stalking horse offers and proposed asset purchase  
15 agreements.

16 8. After due consultation with its advisors, Debtor exercised its business  
17 judgment to enter into the Asset Purchase Agreement with Tricol for the sale of substantially  
18 all of Debtor's assets pursuant to a sale under Section 363 of the Bankruptcy Code ("Stalking  
19 Horse APA" or "APA"). A copy of the Stalking Horse APA is attached hereto as Exhibit A  
20 and incorporated herein by reference.

21 9. The sale proposed under the Stalking Horse APA is subject to the  
22 receipt of higher and better offers received through a court-approved auction or sale process.  
23 If the auction yields a higher and better offer, Debtor will seek authority to effect a sale with  
24 the winning bidder.  
25  
26

## REQUESTED RELIEF

10. Debtor requests that the Court enter a bid procedures order in substantially the form attached hereto as Exhibit B ("Bid Procedures Order") which:

- a. authorizes and approves bid procedures in connection with the receipt and analysis of competing bids, substantially in the form attached as Exhibit 1 ("Bid Procedures") to the Bid Procedures Order;
- b. authorizes and approves procedures (the "Assumption Procedures") for the assumption and assignment of those executory contracts and unexpired leases designated by the successful bidder at the auction (the "Assumed Agreements");
- c. approves the form and manner of notice of (i) the sale and hearing thereon, and (ii) the assumption, assignment and proposed cure costs of Assumed Agreements substantially in the form attached hereto as Exhibit C (the "Sale Notice"); and
- d. establishes the following dates and deadlines, subject to modification as needed, relating to competitive bidding and approval of the sale:
  - Bid Deadline: March 18, 2016 at 5:00 p.m. prevailing Pacific time, as the deadline by which all binding bids must be actually received by Debtor's counsel pursuant to the Bid Procedures (the "Bid Deadline").
  - Objection Deadline: March 18, 2016 at 5:00 p.m. prevailing Pacific time as the deadline to object to the sale transactions and/or the assumption and assignment of Assumed Agreements or cure costs related thereto.
  - Auction: March 28, 2016 at 10:00 a.m. prevailing Pacific time, as the date and time the auction, if one is needed (the "Auction"), will be held at the offices of Tonkon Torp LLP, 888 S.W. Fifth Avenue, Suite 1600, Portland, Oregon, 97204.
  - Sale Hearing: March 30, 2016 at 9:30 a.m. or such other time as is announced at the conclusion of the Auction (the "Sale Hearing"), which will be held before the Honorable Peter C. McKittrick, United States Bankruptcy Judge for the United States Bankruptcy Court for the District of Oregon, Courtroom No. 1 1001 S.W. Fifth Avenue, Portland, Oregon.
- e. approves Tricol as the Stalking Horse Bidder and entitlement to a cash break-up fee for the reimbursement of Tricol's

reasonable and actual expenses incurred in connection with the proposed transaction up to the sum of \$200,000.

11. By this motion, Debtor also seeks entry of an order (the "Sale Order"), substantially in the form agreed upon with the winning bidder, authorizing and approving (a) the sale of the assets free and clear of all liens, claims, interests and encumbrances and (b) the assumption and assignment of the Assumed Agreements in accordance with the Assumption Procedures or, alternatively, approval of the winning bidder as the purchaser of all common stock of the Reorganized Debtor pursuant to confirmation of the Plan.

### THE PROPOSED SALE

12. The principal terms of the Stalking Horse APA are as follows<sup>1</sup>:

Purchaser:	Tricol or a new entity to be formed by Tricol.
Purchase Price:	The purchase price shall be the sum of (a) \$1,600,000 plus (b) the total amount of the Assumed Liabilities (as defined in the APA), plus (c) the amount required to maintain D&O tail insurance for Seller following the Closing (up to a maximum of \$150,000), plus (d) the total obligation owed by Seller under the DIP Credit Facility (as defined in the APA), and (e) the total obligation owed under the Pre-Petition Loan (as defined in the APA). The total Purchase Price is approximately \$3,600,000.
Assets to be Acquired:	Substantially all of the assets of Debtor's as more particularly set forth in the Stalking Horse APA.
Excluded Assets:	Avoidance actions under Chapter 5 of the Bankruptcy Code.
Assumed Liabilities:	Only those liabilities arising from events occurring after the closing date and those expressly set forth in the Stalking Horse APA. It is contemplated that these will include (i) post-petition and pre-petition trade payables with creditors whom Tricol intends to continue to do business; (ii) customer programs; (iii) ordinary course of business liabilities owed to employees that become employees of buyer; (iv) liabilities arising under any Assumed Agreements; (v) administrative expense liabilities; and (vi) the premium for D&O tail insurance.
Excluded Liabilities:	All liabilities other than those expressly identified as Assumed Liabilities.

<sup>1</sup> This summary is provided for the convenience of the Court and interested parties. It is not intended to be a complete summary of the Stalking Horse APA. To the extent there is any conflict between this summary and the Stalking Horse APA, the Stalking Horse APA governs in all respects.

1	Assumption and	Debtor will assume all executory contracts and unexpired leases
2	Assignment of	designated by Buyer, with any cure costs in connection therewith
3	Executory` Contracts:	to be paid by Buyer.
4	Closing Conditions:	The Bankruptcy Court shall have entered the Sale Order including
5		the assumption and assignment of the designated executory
6		contracts and leases, which order shall not have been reversed,
7		modified, amended or stayed at the time of closing. The
8		representations and warranties of the parties set forth in the
9		Stalking Horse APA shall remain true and correct and both parties
10		shall have performed in all material respects the covenants set
11		forth therein. Buyer shall have obtained the consents to
12		assignment of patent licenses with Providence and Dr. Gregory.
13		Buyer shall have entered into mutually acceptable employment
14		agreements for the continued employment of Michael Wax, Stuart
15		Sands, and Simon McCarthy.
16	Bid Protections:	Approval of Tricol as Stalking Horse Bidder and break-up fee for
17		expenses up to \$200,000. Initial overbid must be at least
18		\$450,000 in cash in excess of the Stalking Horse APA Purchase
19		Price.
20	13. In addition to the above general sale provisions, the following sale	
21	provisions are disclosed in accordance with applicable local rules and guidelines:	
22	Sale to Insider:	Buyer is not an insider as defined in Bankruptcy Code
23		§ 1101(31).
24	Sale Free and Clear:	The sale will be free and clear of liens and other interests, and the
25		parties with such interest and the nature of those interests are set
26		forth below.
27	Liens:	Certain assets are encumbered by a lien asserted by Sussex
28		Associates, L.P. ("Sussex"). The amount of the secured claim is
29		in excess of \$5,000,000. All assets are also be encumbered by
30		Tricol pursuant to post-petition financing obtained in this case in
31		the sum of \$800,000, which post-petition lien will continue in the
32		assets until the post-petition financing is paid in full.
33	Releases and Insider	None, except for employment contracts with Mr. Wax and
34	Benefits:	Mr. McCarthy and termination agreement with Mr. Sands.
35	Closing Deadlines:	The sale shall close on or before March 31, 2016, or the earliest
36		practicable date after entry of the Sale Order.
37	Good Faith Deposit:	Tricol has deposited the sum of \$200,000. Qualified bidders will
38		be required to submit a good faith deposit equal to \$400,000 (to
39		cover the Break-Up Fee and their own \$200,000 deposit).
40	Interim Arrangement	None, except the DIP Facility as set forth in the motion [ECF
41	with Proposed Buyer:	no. 11] filed by Debtor on January 15, 2016 and the Interim Order
42		[ECF No. 36] entered on January 22, 2016.

1	Use of Proceeds:	Proceeds from the sale will be distributed to the secured and other
2		creditors as set forth in the Stalking Horse APA and pursuant to
3	Record Retention:	After the sale, Debtor will have reasonable access to the books
4		and records as necessary to administer the Chapter 11 case and
5	Sale of Avoidance	The sale does not include the sale of any avoidance claims under
6	Actions:	Chapter 5 of the Bankruptcy Code.
7	Requested Findings as to	Buyer shall not be a successor to Debtor and shall have no
8	Successor Liability:	liability or responsibility for any liability or obligation of Debtor
9		other than as expressly set forth in the Stalking Horse APA. The
10		sale to Buyer will not subject Buyer or its affiliates, successors or
11		assigns or their respective properties to any liability for claims
12		against Debtor or Debtor's Assets.
13	Credit Bidding:	The motion does not seek to limit credit bidding under
14		Section 363.
15	Standard for Approval:	The motion seeks approval of the proposed sale pursuant to the
16		business judgment standard.
17	Relief from Bankruptcy	This motion requests relief from Bankruptcy Rule 6004(h).
18	Rule 6004(h):	
19	Solicitation Process:	Notice of the proposed sale will be given to all parties and
20		creditors in interest, and parties previously expressing an interest
21		in Debtor's assets.

## AUCTION AND BID PROCEDURES

14. The proposed Bid Procedures are intended to permit a fair and efficient competitive sale consistent with the time line of this Chapter 11 case and promptly identify any alternative bid that is higher or otherwise better than the bid set forth in the Stalking Horse APA. Because the Bid Procedures are attached as Exhibit 1 to the proposed Bid Procedures Order, they are not restated herein. Generally speaking, however, the Bid Procedures establish, among other things:

- The deadlines and requirements for becoming a Potential Bidder, submitting competing bids and the method and criteria by which such competing bids are to become entitled to be Qualified Bids sufficient to trigger an Auction, including the minimum consideration that must be provided and the terms and conditions that must be satisfied by any Bidder (other than Tricol) to be entitled to be a

Potential Bidder and a Qualified Bidder" (*See* Bid. Proc. at ¶¶ B, D).

- The manner in which Qualified Bids will be evaluated by Debtor to determine the starting bid for the Auction (*See* Bid. Proc. at ¶ E).
- The procedures for conducting the Auction, if any (*See* Bid. Proc. at ¶ G).
- The criteria by which the "Successful Purchaser" will be selected by Debtor, in consultation with its advisors (*See* Bid. Proc. at ¶ H-I).
- Various other matters relating to the sale process generally, including the Sale Hearing, designation of a Back-Up Bidder, payment of the bid protections, return of any Sale Deposits and certain reservations of rights (*See* Bid. Proc. at ¶¶ J-M).

15. The Bid Procedures recognize Debtor's fiduciary obligations to maximize sale value, and, as such, do not impair Debtor's ability to consider all qualified bid proposals, and preserve Debtor's right to modify the Bid Procedures as necessary or appropriate to maximize value for Debtor's estate in consultation with key parties set forth therein.

16. The Bid Procedures contain the following provisions that are required to be highlighted pursuant to local rules and guidelines:

- (i) Provisions Governing Qualification of Bidders. The provisions governing an entity's right to become a Qualified Bidder are set forth in paragraphs B and D of the Bid Procedures.
- (ii) Provisions Governing Qualified Bids. The provisions governing Qualified Bids are set forth in paragraphs D and E of the Bid Procedures. Such provisions include, among other things, the deadlines for submitting a bid, the requirements for submitting a bid, the assets to be included in the bid, the period the bid must remain open, and the requirement to provide the Sale Deposit. Tricol is deemed to have satisfied all of the bidding conditions.
- (iii) Provisions Providing Bid Protections to "Stalking Horse" Bidder. Paragraph A of the Bid Procedures sets forth the "stalking horse" bidder protections. The Stalking Horse APA does not include any limitations on Debtor's ability to solicit



1 higher or better bids. It does provide for the provision of a  
2 Break-Up Fee for expenses incurred up to the amount of  
3 \$200,000, which shall be paid in the event that the Assets are  
4 sold to a party other than Tricol.

- 5 (iv) Bidding Increments. Paragraphs D and G of the Bid  
6 Procedures set forth the amount of the initial bid and any  
7 successive bidding increments.
- 8 (v) Due Diligence Period. Interested parties shall have until the  
9 Bid Deadline to conduct due diligence. Paragraph C of the Bid  
10 Procedures sets forth the requirements for obtaining due  
11 diligence access.
- 12 (vi) Modification of Bidding and Auction Procedures.  
13 Paragraph M of the Bid Procedures authorizes Debtor, without  
14 further order of the Court, to modify the Bid Procedures.
- 15 (vii) Closing with Alternative Backup Bidders. Paragraph J of the  
16 Bid Procedures addresses the ability of Debtor to sell the  
17 Assets to the Back-Up Bidder.
- 18 (viii) Provisions Governing the Auction. Paragraph G of the Bid  
19 Procedures sets forth the provisions governing the auction, and  
20 this Motion specifies the date, time and place at which the  
21 Auction will be conducted and the method for providing notice  
22 to parties of any changes thereto. Further, Paragraph D(1) of  
23 the Bid Procedures requires each bidder to identify whether it  
24 is bidding for itself or others and if for others, the identities of  
25 such parties and whether the bidder is party to any agreement  
26 limiting the bidders at the auction.

## 17 SUMMARY OF THE ASSUMPTION AND ASSIGNMENT PROCEDURES

18 17. Debtor is also seeking approval of certain procedures to facilitate  
19 the fair and orderly assumption and assignment of the Assumed Agreements in  
20 connection with the Sale. The Assumption Procedures are as set forth below.

21 **Notice of Cure Procedures.** Debtor will file a cure  
22 schedule (the "Cure Schedule") and serve such  
23 schedule and an Assumption and Assignment Notice  
24 by first class mail on the parties to those executory  
25 contracts and unexpired leases that will be included  
26 in any sale and those other executory contracts and  
unexpired leases that may be included in the sale (the  
"Assumed Agreements") by March 4, 2016. The  
Cure Schedule will include the (i) Assumed  
Agreements; (ii) the name and contact information of

1 the counterparty to each Assumed Agreement; and  
2 (iii) the proposed cure amount for each Assumed  
Agreement.

3 **Objections.** Any objection to the assumption and  
4 assignment of the Assumed Agreements identified  
5 on the Cure Schedule, including objections to the  
6 cure amount set forth on such schedule and to  
adequate assurance of future performance, must be  
filed with the Bankruptcy Court no later than  
March 18, 2016.

7 **Resolution of Objections.** If no objection is timely  
8 filed to the assumption and assignment of an  
9 Assumed Agreement, the counterparty to such  
10 Assumed Agreement will be barred from objecting  
11 thereto and shall be deemed to consent to the  
12 assumption and assignment of such Assumed  
13 Agreement. If no objection is timely filed to the  
14 proposed cure amount with respect to an Assumed  
Agreement, then the cure amount set forth in the  
Cure Schedule shall be binding upon the non-debtor  
party to such Assumed Agreement for all purposes in  
this Chapter 11 case and will constitute a final  
determination of the total cure amount required to be  
paid in connection with the assumption and  
assignment thereof.

15 If a timely objection is filed and such objection  
16 cannot otherwise be resolved by the parties, the  
17 Bankruptcy Court may hear such objection at the  
18 Sale Hearing, or any adjourned date thereof. The  
19 pendency of a dispute relating to a proposed cure  
20 amount will not delay the closing of the sale,  
21 including the assumption and assignment of  
22 Assumed Agreements necessary to effectuate such  
closing, provided that, for any dispute relating to a  
proposed cure amount that is unresolved by the date  
of the closing on the sale, Buyer shall pay and  
Debtor shall escrow the claimed cure amount  
requested with respect to such unresolved objection  
pending such resolution.

## 23 **BASIS FOR RELIEF REQUESTED**

### 24 **A. SALE OF ASSETS**

25 18. Section 363(b)(1) of the Bankruptcy Code provides that "Debtor, after  
26 notice and a hearing, may use, sell, or lease, other than in the ordinary course of business,

1 property of the estate." This provision generally allows a trustee (subject to court approval)  
2 to sell property of the estate outside the ordinary course of business where the proposed sale  
3 is a sound exercise of Debtor's business judgment and when the sale is proposed in good faith  
4 and for fair value. *Committee of Equity Security Holders v. Lionel Corporation (In re Lionel*  
5 *Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983); *In re Ernst Home Center, Inc.*, 209 B.R. 974,  
6 980 (Bankr. W.D. Wash. 1997). When a trustee articulates a reasonable basis for its business  
7 decisions, "courts will generally not entertain objections to the [trustee's] conduct." *Comm.*  
8 *of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R.  
9 612, 616 (Bankr. S.D.N.Y. 1986).

10           19.     The decision to sell the assets has been approved by Debtor's board of  
11 directors as necessary given Debtor's lack of sufficient capital to continue operations. The  
12 assets are fully encumbered by Tricol to secure post-petition financing extended by Tricol to  
13 Debtor. Tricol's security interest will continue in the assets until the post-petition financing  
14 is paid in full. Debtor's accounts, inventory, purchase orders, intellectual property and  
15 patents are encumbered by the Sussex to secure pre-petition loans. A sale will provide the  
16 secured creditors with a greater return than liquidation and with prompt payment. The  
17 proposed sale will also result in the continued employment of many of Debtor's employees  
18 and preserve business relationships and sales for vendors, customers, and other parties who  
19 are presently doing business with Debtor. A sale will provide certainty of ownership and  
20 continuity of the business which would not otherwise be possible. Debtor does not have  
21 sufficient resources to continue operating or file a plan of reorganization prior to the  
22 proposed sale. Debtor has determined that it is in the best interests of Debtor's estate to sell  
23 the Assets under 11 U.S.C. § 363 to Tricol or another buyer who can continue some or all of  
24 Debtor's operations.

25           20.     The Stalking Horse APA was negotiated at arm's length, in good faith,  
26 and Debtor believes its terms are fair and reasonable. Tricol is not an "insider" of Debtor and

1 neither Debtor nor its management has a financial interest in the transactions contemplated  
2 by the Stalking Horse APA other than continued employment.

3 21. Debtor proposes to effect the sale only after holding the Auction  
4 pursuant to the Bid Procedures, which procedures are designed to procure the highest and  
5 best offer for the sale of the assets.

6 **B. SALE FREE AND CLEAR OF LIENS, CLAIMS AND**  
7 **ENCUMBRANCES**

8 22. Debtor requests that the Court authorize the sale free and clear of all  
9 liens, claims and encumbrances which may be asserted against the assets, with any such  
10 liens, claims, interests and encumbrances attaching to the proceeds of the sale. The  
11 Successful Bidder will have no successor liability to any creditor who holds a claim as of the  
12 closing date except as specifically stated in the APA and all such creditors will be forever  
13 enjoined from seeking to enforce or collect any such claim from or against the successful  
14 bidder.

15 23. Tricol (and potential bidders in the auction process) will only buy the  
16 assets if they are "free and clear" of liens.

17 24. Holders of liens and interests in the assets will be adequately protected  
18 because they will be paid from the sale proceeds or their interests will attach to the proceeds  
19 of the sale.

20 **C. ASSUMPTION AND ASSIGNMENT OF EXECUTORY CONTRACTS**

21 25. As described above, as part of the sale contemplated by the Stalking  
22 Horse APA, Debtor intends to assume and assign certain executory contracts.

23 26. Under § 365(a), Debtor may assume or reject an executory contract,  
24 subject to the court's approval. In determining whether to approve a request for approval of  
25 assumption of an executory contract, the bankruptcy court applies the business judgment rule.  
26

1                   27.     In addition to passing the business judgment test, Section 365(b) of the  
2 Bankruptcy Code requires that a debtor meet certain additional requirements to assume an  
3 executory contract:

4                             If there has been a default in an executory  
5 contract or unexpired lease of the debtor, Debtor may  
6 not assume such contract or lease unless, at the time  
of assumption of such contract or lease, Debtor—

7                             (A)     cures, or provides adequate assurance  
that Debtor will promptly cure, such default;

8                             (B)     compensates, or provides adequate  
9 assurance that Debtor will promptly compensate, a  
10 party other than the debtor to such contract or lease,  
for any actual pecuniary loss to such party resulting  
from such default; and

11                            (C)     provides adequate assurance of future  
12 performance under such contract or lease.

13                   28.     Similarly, Section 365(f)(2) applies similar requirements to the  
14 assignment of an executory contract, stating that the contract may be assigned if:

15                            (A)     Debtor assumes such contract or lease in  
16 accordance with the provisions of this section;  
and

17                            (B)     adequate assurance of future performance by the  
18 assignee of such contract or lease is provided,  
whether or not there has been a default in such  
19 contract or lease.

20                   29.     In this case, Debtor's proposed assumption and assignment of the  
21 executory contracts to Tricol or another bidder would fulfill the "cure" and "adequate  
22 assurance" requirements for assumption and assignment set forth in the aforementioned  
23 statutes. Any defaults under the contracts and leases would be cured by Tricol at closing or  
24 as soon thereafter as the Court establishes the amount of the cure payment needed (or the  
25 parties agree on such amount). If another entity is the successful purchaser, it will have had  
26

1 to satisfy Debtor and the Court of its financial strength and, therefore, similarly will fulfill  
2 the "adequate assurance" requirement.

3 30. Some, if not all, of the executory contracts at issue may contain  
4 provisions purporting to prohibit or condition the assignment to third parties. The  
5 Bankruptcy Code specifically prohibits the termination or modification of executory  
6 contracts based on such clauses that restrict assignment. 11 U.S.C. § 365(f).

7 **D. BID PROTECTIONS**

8 31. Debtor also requests approval of a breakup fee of \$200,000. The  
9 breakup fee would be payable to Tricol in the event another bidder prevails at the Auction  
10 and an alternate sale ultimately is approved.

11 32. In evaluating breakup and similar fees, courts have applied three basic  
12 standards: (a) the business judgment test; (b) the best interests of creditors test; and (c) the  
13 "actual and necessary" or administrative expense test. It appears that the Ninth Circuit has  
14 not adopted (or rejected) any of the foregoing tests. No matter which test it chooses to apply,  
15 however, it would be appropriate for the Court to approve the Break-Up Fee.

16 33. Although courts may apply different analytical standards, they  
17 generally reach the same conclusion: breakup fees are appropriate when they encourage  
18 bidding and are in the best interest of the estate. *See, e.g., In re Integrated Resources, Inc.*,  
19 147 B.R. 650 (S.D.N.Y. 1992), *app. dismissed on jurisdictional grounds*, 3 F.3d 49 (2d Cir.  
20 1993) (applying the business judgment standard to approve breakup fee that helped attract  
21 and retain a potentially successful bid and attract other bidders); *In re America West Airlines,*  
22 *Inc.*, 166 B.R. 908, 912 (Bankr. D. Ariz. 1994) (applying the best interest of creditors tests  
23 and focusing on "whether the transaction will further the diverse interests of the debtor,  
24 creditors and equity holders alike"); *In re O'Brien Environmental Energy, Inc.*, 181 F.3d 527,  
25 535 (3d Cir. 1999) (applying the "actual and necessary" test and stating that the estate  
26 benefits if the breakup fee induced "a bid that otherwise would not have been made \* \* \*");

1 *In re 995 Fifth Avenue Associates, L.P.*, 96 B.R. 24, 28 (Bankr. S.D.N.Y. 1989) (bidding  
2 incentives may be "legitimately necessary to convince a white knight to enter the bidding by  
3 providing some form of compensation for the risks it is undertaking").

4 34. Here, the break-up fee is designed to compensate Tricol for the time  
5 and expense of negotiation and due diligence in connection with its proposed purchase. The  
6 amount of the break-up fee is the amount of expenses incurred by Tricol in connection with  
7 the proposed transaction up to the maximum amount of \$200,000.

8 **E. NON-APPLICABILITY OF STAY**

9 35. In addition to the other sale-related relief sought herein, Debtor  
10 requests that the Court specifically find inapplicable any stays that might otherwise inhibit  
11 Debtor's ability to close the proposed transactions for the sale of the assets immediately after  
12 the Court enters an order approving the transactions, including, without limitation, those  
13 arising under Bankruptcy Rules 6004 or 6006. Any delay in a closing of the sale would  
14 mean substantial potential harm to Debtor, its creditors and its estate as the terms of the  
15 proposed sale require closing on or before April 30, 2016.

16 **NOTICE**

17 36. Debtor proposes to give notice of the Auction, this Motion and the  
18 Sale Hearing as follows: serve a copy of this Motion and the Sale Notice upon (i) counsel for  
19 the unsecured creditors committee appointed in this case; (ii) all persons or entities required  
20 to be served pursuant to orders of this Court; (iii) all parties who have filed requests for  
21 notice under Bankruptcy Rule 2002 as of the date of service; (iv) all persons or entities who  
22 to the knowledge of Debtor hold a lien upon the assets; (v) the Office of the United States  
23 Trustee; and (vii) all non-debtor parties to the Assumed Agreements. In addition, Debtor  
24 shall serve the Notice of Motion to Approve Sale to Tricol or Higher and Better Bidder at  
25 Auction, Auction, Bidding Procedures, Sale Hearing, and Objection Deadlines on all  
26 creditors and parties in interest reflected in the mailing matrix on file with the Court.

1           37. Debtor submits that such notice constitutes good and sufficient notice  
2 of the competitive offer procedures, this Motion, and all proceedings to be held thereon and  
3 that no other or further notice need be given.

4           WHEREFORE, Debtor respectfully requests that the Court (a) enter an order  
5 approving the Bid Procedures; and (b) as soon as practicable after completion of the Auction,  
6 enter an order (i) approving the sale of the assets (or stock) to Tricol or other successful  
7 purchaser, (ii) approving such sale free and clear of all liens, claims and encumbrances with  
8 such interests attaching to the sale proceeds; (iii) approving the assumption and assignment  
9 of executory contracts and unexpired leases to Tricol or other successful purchaser;  
10 (iv) declaring all stays including, without limitation, those arising under Bankruptcy Rules  
11 6004 or 6006 inapplicable; and (v) such other and further relief as may be just and proper.

12           DATED this 26th day of January, 2016.

13                           TONKON TORP LLP

14                           By /s/ Albert N. Kennedy  
15                           Albert N. Kennedy, OSB No. 821429  
16                           Timothy J. Conway, OSB No. 851752  
17                           Attorneys for Debtor  
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